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APPENDIX B: Constitutionality of Idaho's Putative Father Statute

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Background

In a series of cases beginning with *Stanley v. Illinois*, 450 U.S. 645 (1972) through, most recently, *Lehr v. Robinson*, 463 U.S. 248 (1983), the United States Supreme Court has made clear that an unwed father has a constitutionally protectable interest in establishing a relationship with his child. While the opportunity to establish such a parental relationship may be fleeting and may be lost through the father's own failure to act, the U.S. Supreme Court has made clear that this interest cannot be unilaterally terminated by the state's failure to provide an adequate procedural framework in which the unwed father may act to protect his interest.

The *Stanley* case involved a situation in which the father and mother had lived together for approximately 18 years, during which they had three children. When the mother died suddenly, the State of Illinois initiated a dependency proceeding and took custody of the children as wards of the state. It declined to give Stanley an opportunity to appear and be heard at the hearing and found that it could ignore Stanley's relationship with his children because he was not married to their mother. The state statutory scheme functioned on the assumption that an " unwed father is not a 'parent' whose existing relationship with his children must be considered." *Stanley*, 450 U.S. at 649-50. In a strongly worded opinion, the Court rejected the implicit state presumption that all unwed fathers were unfit and that their parental rights could be terminated without a hearing. Rather, the Court held that the state could not terminate the parental rights of an unwed father who has established a relationship with his children without first conducting a hearing to determine whether the father is unfit. It rejected the state's argument regarding efficient handling of adoption concluding, "[p]rocedure by presumption is always cheaper and easier than individualized determination. But when, as here, the procedure forecloses the determinative issues of competence and care, when it explicitly disdains present realities in deference to past formalities, it needlessly risks running roughshod over the important interests of both parent and child."

The significance of Stanley's established parental relationship is underscored by the next two cases decided by the U. S. Supreme Court. *Quilloin v. Wolcott*, 434 U.S. 236 (1989) and *Caban v. Mohammed*, 441 U.S. 380 (1979). In both of these cases the new husbands of the children's mothers wanted to adopt the children, and the biological fathers objected. In both cases the biological fathers' paternity was undisputed, and both fathers participated in the adoption proceedings. As in many states at the time, statutes provided that an unmarried father's child could be adopted without his consent if the court found this to be in the child's best interests. However the statutes also

allowed other categories of parents – married fathers and all mothers – to veto adoption of their children unless the vetoing parent was found to be unfit or to have abandoned the child. In both *Quilloin* and *Caban*, the unmarried fathers challenged the constitutionality of these statutes that provided only limited protection for their substantive rights on equal protection and substantive due process grounds.

In *Quilloin*, the father had had little or no contact with the child or mother in the four years since the child's birth. He had not paid child support, visited or contacted the child, or filed any action to establish his paternity. Only after the stepfather began proceedings to adopt the child did the birth father make any attempt to assert his parental rights. The Court held that the father had not "seized his opportunity interest", and thus had no protectable liberty interest in establishing his parentage. Thus it upheld the statutory scheme.

Caban contrasts with *Quilloin*. In *Caban* the father had had substantial, although indirect, contact with the children. He had lived with them and their mother for the first two years of their lives. After that he had indirect contact with them through their grandmother over a period of several years. He did not seek to establish his paternity formally. Nor did he pay child support to the children's mother. However, the Court recognized that, despite failing to comply with formal obligations of parenthood, Caban had "established a parental relationship" with his children and thus had a cognizable liberty interest in continuing his relationship. Thus the Court concluded that the statutory scheme which treated an unwed father with an established parental relationship differently from mothers and married fathers, violated Caban's equal protection rights.

While *Stanley*, *Quilloin* and *Caban* established the fundamental principal that an unwed father who has established a relationship with his children is a parent whose rights cannot be ignored because he was not married to his children's mother, the cases did not address the rights of unwed fathers who had not yet had the opportunity to establish a parental relationship. In *Lehr v. Robinson*, the Court considered the procedural protections due such an unwed father. In describing the nature of the unwed father's rights the *Lehr* Court stated "the significance of the biological connection [between father and child] is that it offers the natural father an opportunity that no other male possesses to develop a relationship with his offspring. If he grasps that opportunity and accepts some measure of responsibility for the child's future, he may enjoy the blessings of the parent-child relationship and make uniquely valuable contributions to the child's development. If he fails to do so, the Federal Constitution will not automatically compel a state to listen to his opinion of where the child's best interests lie." *Lehr,* 463 U.S. at 262. After so describing the nature of the unwed father's constitutional interest, the Court framed the question in *Lehr* as "whether New York has adequately protected [the unwed father's] . . . opportunity to form [a parent-child] . . . relationship." *Id.* at 262-63. Thus the Court imposed the constitutional burden on the state to provide a process in which the unwed father could protect his interest in forming a relationship with the child.

The Court reviewed and upheld the New York statutory scheme that provided notice to seven different categories of unwed fathers: "In addition to the persons whose names are listed on the

putative father registry, New York law requires that notice of an adoption proceeding be given to several other classes of possible fathers of children born out of wedlock – those who have been adjudicated to be the father, those who have been identified as the father on the child's birth certificate, those who live openly with the child and the child's mother and who hold themselves out to be the father, those who have been identified as the father by the mother in a sworn written statement, and those who were married to the child's mother before the child was six months old." *Lehr,* 463 U.S. at 251. In evaluating this notice scheme, the Court concluded that "if this scheme [referring the New York putative father provisions] were likely to omit many responsible fathers, and if qualification for notice were beyond the control of an interested putative father, it might be thought procedurally inadequate." *Lehr*, 463 U.S. at 264.

In *Petition of Steve B.D.*, 112 Idaho 22, 730 P. 2d 732 (1986), the Idaho Supreme Court followed *Lehr*, a case involving similar facts.[1] In *Steve B.D.* the father knew of the child's birth and visited the child and mother in the hospital. After that time, however, he had no contact with the child, offered no financial support for the child, refused to sign and affidavit of paternity and did not marry the child's mother. Under those circumstances, the Idaho Court found that the termination of the father's relationship with the child did not violate the father's due process rights.

Analysis

Idaho Code § 16-1615 is likely unconstitutional under the principles established in the *Stanley/Lehr* line of cases. Those cases stand for the proposition that the unwed father has a liberty interest in establishing a relationship with his child. As a result of that interest, the state cannot have a procedural framework that does not provide a reasonable opportunity for the father to assert his interest. As pointed out above, the statute upheld in *Lehr* required the state to notify seven different classes of fathers before terminating their rights. The Court upheld this provision. Although it is not inconceivable that a statute providing fewer protections than the New York statute in *Lehr* might be constitutional, the Court has not, to date, reviewed such a provision. Rather, it specifically concluded that a statutory scheme likely to omit many responsible fathers would be unconstitutional. Thus, any statute providing fewer protections than that of *Lehr* is constitutionally suspect.

The Idaho Putative father statute does not even come close to meeting the standard of *Lehr*. The proposed legislation purports to relieve the state almost entirely of its obligation to provide a procedural framework in which an unwed father can assert his constitutionally protected liberty interest. Section 16-1501A (3)(e) provides that "an unmarried biological father is presumed to know that the child be adopted without his consent unless he strictly complies with the provisions of this

[1]The Court did not address the Idaho Constitutional issues because they were not raised by the petitioner in the case.

chapter . . ."

This language purports to place all of the responsibility on the unmarried father. When the statute as a whole is evaluated, it places virtually no responsibility on the state[2] to provide notice to unmarried fathers even under circumstances where the state knows who the father is because the mother has disclosed his identity and/or the father has an established relationship with the child. The only times unwed fathers would be entitled to notice under the statute are where the father of a child over six months old at the time of placement has lived with the child for a period of six months during the year immediately preceding the adoption or has paid child support and visited the child monthly or communicated with the child when financially unable to visit. Section 16-1504 (2)(a). With regard to a child under the age of six months at the time of placement, the statute only requires notice if the father has commenced proceedings to establish paternity and seek full custody of the child, filed notice of the paternity proceedings with Vital Statistics, and paid pregnancy expenses if he had notice of the pregnancy. Section 16-1504 (2)(b). *Lehr* is clear – the state has a responsibility to have a procedural framework that does not impede the father's ability to assert his constitutional interests.

Just as troubling as the procedural issues noted above, the proposed Idaho law would permit the termination of established parental relationships without notice. *Stanley* and *Caban* establish that fathers who have an established parental relationship with their children have a liberty interest which is subject to protection by the state. Neither the *Stanley* Court nor the *Lehr* Court subjected the father's parental relationship to a litmus test such as paying support or visiting the child.

Under the proposed Idaho the parental rights of the father in *Caban* would have been terminated without notice. That father had not lived with his children for six months during the year preceding the adoption. He had had only erratic and indirect contact with the children. He clearly did not visit the children monthly or communicate with them regularly. In *Caban* the father's lack of contact was in part the result of the mother's actions to impede contact. But even if a court relieved the father of the contact provisions in the statute, the father would nonetheless have violated the financial responsibility provisions because he had made no effort to pay child support.

Under the Idaho putative father statute, fathers in a number of categories in which a liberty interest could be established would not receive protection including:

a. Those listed on the birth certificate. This is a particularly vulnerable group with regard to children under six months of age at the time of placement. These men may not even know of the

[2]I'm using the term state to include any agency whether private or public that facilitates the adoption. I don't think there is a state action issue with private agencies because the statute sets forth the standards under which a court may approve the adoption.

child's existence. The liberty interest is very ephemeral in these cases, however, because mother has acknowledged their possible paternity the burden of providing them notice of the pending parental termination is low. The only reason to not notify these men is to preclude them from asserting their right to a parental relationship with their children.

b. Fathers who lived for substantial periods of time with their children but whose relationship has been strained during the year preceding the birth. If these fathers have not paid child support or have not visited monthly or contacted their children, their rights could be terminated without notice despite the prior lengths and substance of their parental relationship. The reason for terminating these fathers is unclear. Under the Idaho parental termination statute willful failure to maintain contact for a year is presumed abandonment. If these fathers have truly abdicated their parental relationship they can be easily terminated under the statute. But the difference between no contact and monthly visitation and payment of child support is substantial – no father in between the two standards would be entitled to notice of the termination proceeding under the proposed statute. In fact the statute sets up a situation where a father whose rights could not be terminated under the parental termination statute, would nonetheless not be entitled to notice under these notice provisions!

c. Fathers of a child under six months at the time of placement who acknowledge paternity and seek visitation could still be cut off without notice if they are not "fully able" to have "full custody"[3] of their child. Thus a father who seeks joint custody or visitation rights in a paternity action could still be terminated without notice.

The previous examples are not exhaustive. Suffice it to say that many unwed fathers whose relationship with their children is entitled to constitutional protection under the *Stanley/Lehr* line of cases could be terminated under the Idaho statute. Other fathers who have a liberty interest in establishing a relationship would not be provided the procedural framework in which to do so.

[3]The use of the term "full custody" is itself probably constitutionally vague. This term has no established meaning. I am assuming that the term means "sole custody", but conceivably some form of "joint custody" could be considered full.